IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1990 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHIVALAYA CO.OP.HOU.SOC.LTD.

Versus

SHANTABEN T PATEL

Appearance:

MS KJ BRAHMBHATT for Petitioner

MR HB SHAH for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 06/02/2001

ORAL JUDGEMENT

The appellant above named, has preferred this First Appeal against the judgment and decree dated 30.10.1982 recorded by the learned Civil Judge (SD), Bharuch in Special Civil Suit No.75/80 under which the

learned trial Judge dismissed the suit of the original plaintiff for specific performance of the suit agreement. However, the learned Trial Judge granted a decree in favour of the appellant-original plaintiff for the recovery of Rs.25,000/- with interest at the rate of 9% per annum from 9.6.1980. The learned trial Judge further directed that the parties shall bear their own costs in the suit. The appellant-original plaintiff filed the aforesaid suit for specific performance of an agreement to purchase the property mentioned in the judgment impugned before this court. The trial court has dismissed the suit as aforesaid and, therefore, the appellant-original plaintiff has preferred this appeal before this court.

2. The respondents above named have taken up a preliminary objection against the maintainability of the suit itself. It has been contended in written objections filed by the respondents that the suit was filed by the appellant-original plaintiff for specific performance in respect of an agricultural land owned and possessed by the respondents. That the suit was filed in the court of learned Civil Judge (SD), Bharuch and the same was dismissed. It is further contended that looking to the plaint itself, it becomes evident that the appellant-plaintiff Society was simply a proposed Coop. Society at the time of filing of the suit and at the time of the agreement to sale. That the appellant-original plaintiff society was not a registered society at relevant point of time. It is further contended that a suit by an unregistered cooperative Society was not maintainable and, therefore, when the suit by an unregistered cooperative society was not maintainable, the appeal would also be not maintainable and, therefore, the appeal may be dismissed on the aforesaid technical legal aspect alone.

3. Copy of the objection was supplied to the appellant. I have heard the learned Advocates for the parties and have perused the papers on the aforesaid aspects of the case.

4. Learned advocate for the appellant has contended that the aforesaid plea was not taken up by the respondent above named in the written statement filed by them before the trial court when the suit was pending. It is further contended that no such objection was taken when the matter was pending before this court at the admission stage when the appeal was admitted. It is further contended that since no such objection was raised before the trial court, the trial court did not frame

issue on this aspect of the case. It is further contended that the aforesaid contention and dispute is pending before the Supreme Court and, therefore, this court may not decide this issue in this matter.

5. The facts are not much in dispute. It seems that the aforesaid plea was not raised by the respondents above named before the trial court when they filed written statement. Therefore, no issue was framed by the trial court. It is also not much in dispute that the aforesaid issue does not appear to have been raised when the appeal was admitted. These facts are not seriously in dispute before me. At the same time, the aforesaid aspect of the case is not a question of fact. On the contrary, it is an admitted position and admitted question of fact. The plaintiff has tendered oral evidence of Devidas Patel at Exh.57 before the trial court and there he has made it clear in the examination-in-chief that he is the Chief Promoter of the proposed Shivalaya Cooperative Housing Society. This means that even when the suit was filed and evidence was adduced, the appellant-original plaintiff was yet not registered as a Cooperative Society. Therefore, the fact that an agreement was entered into by an unregistered Cooperative Society and the fact that the suit was filed by an unregistered Cooperative Housing Society are not disputed questions of fact. Therefore, simply because such plea was not raised before the trial court at the time of submission of written statement and simply because there was no issue framed by the trial court on the aforesaid aspect of the case, it cannot be said that the aforesaid technical objection cannot be raised for the first time in this First Appeal.

6. It is to be considered that the aforesaid issue does not arise out of disputed questions of fact. On the contrary, the aforesaid issue becomes an issue of law based on admitted question of fact as said above. The appellant itself has admitted in the beginning of the evidence before the trial court that it is a proposed Cooperative Housing Society and the person who had adduced evidence on behalf of the appellant was the Chief Promoter thereof. This would positively show that the appellant-original plaintiff was and is a proposed Cooperative Society and, therefore, was not/is not a registered Cooperative Society. It is also to be considered that nowhere it is pleaded before the trial court at any point of time that the appellant-original plaintiff was a duly registered Cooperative Society.

7. It would be relevant to refer to the provisions

made in Section 37 of the Gujarat Cooperative Societies Act, 1961, hereunder:

> "37. Societies to be bodies corporate. A society on its registration shall be a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to acquire, hold and dispose of property, to enter into contracts, to institute and defend suits and other legal proceedings, and to do all such things as are necessary for the purpose for which it is constituted."

The above provision makes ita clear that a Cooperative society acquires status of a corporate body or an artificial person only on its registration. It can get power to acquire, hold and dispose of property to enter into contracts, to institute and defend suits and other legal proceedings only after its registration and not before registration. Therefore, the appellant, not being either a living person nor being an artificial person like a duly registered Cooperative Society, could not legally hold or acquire property and could also not enter into contract. Hence, the disputed agreement of purchase of the disputed property in favour of an unregistered Cooperative society like the appellant original plaintiff, would be illegal, against the statutory provisions of section 37 of the said Act and hence not enforceable in a court of law. Similarly, the appellant not being a living or an artificial person like a duly registered partnership firm, could not legally institute a civil suit before the trial court for getting a decree for specific performance of an agreement of purchase of suit property in favour of an unregistered Cooperative Society since the civil proceedings could legally be instituted either by a living person or by an artificial person or a legal entity. The appellant is neither of these categories. Therefore, the suit so filed by such an appellant is, not and was not maintainable.

8. On this aspect of the case, it would be worthwhile to refer to a decision in he case of Jayantilal Hansraj Shah & Ors. v. Hemakuwarben Dolatraj Dave (1996 (1) GLH 893). There it has been very clearly laid down that a contract by a non-existent co-operative society on whose behalf someone purports to act, is a nullity and does not give rise to any cause of action or create any right in favour of a person. It would be worthwhile to refer to paras 9 and 10 of the decision

which are being reproduced for ready reference hereinbelow:

> "It may be noted that Late Maharaja Shri Indravijaysinhji Jadeja had executed an agreement to sell dated July 12, 1980 in favour of a non-existent cooperative society, i.e. proposed Vijay Cooperative Housing Society Ltd, and its so-called members. The question as to what is the effect of a contract between the non-existent co-operative society and the other party came to be considered by the Division Bench of this court in the case of Narsinhji & Ors. v. Narsinh Nagar alias Tekri Coop.Housing Society Ltd. & Ors., reported in 20 GLR 801. In the said case, an agreement of lease was entered into between a Trust on one hand and a non-existent cooperative society on the other hand. After examining the scheme of Gujarat Co-operative Societies Act, 1961 in detail and relevant provisions of the Specific Reliefs Act, 1963, the Division Bench has held that a contract between a non-existent society on whose behalf someone purports to act, is a nullity and gives no rise to cause of action. It is ruled in the said case that in view of section 37 of the Gujarat Cooperative Societies Act, it is clear that a cooperative society becomes a legal person after it is registered and it is after its registration that it acquires the capacity to enter into contracts. On interpretation of the language of section 37 of the Gujarat Cooperative Societies Act, 1961 and R.3 of the Gujarat Cooperative Societies Rules, 1965, the court held therein that agrement of lease entered into between the Trust on one hand and a non-existent cooperative society on the other hand was a nullity and gave no rise to cause of action for the society and, therefore, it could not be specifically enforced against the Trust.
>
> In view of the above quoted binding decision of the Division Bench, I am of the view that the agreement for sale executed by Late Maharaja Shri Indravijaysinhji in favour of the petitioners who are members of the proposed Vijay Cooperative Housing Society is a nullity and creates no right in favour of the petitioners."

9. The aforesaid aspect of the case and the aforesaid observations of this court make it clear that

the proposed cooperative society, not being duly registered co-operative society, could not enforced a contract in favour of an unregistered cooperative society. So it is clear that an unregistered cooperative society cannot enter into contract and in the same way but it cannot file a suit for getting the contract enforced or performed in favour of an unregistered cooperative society. In the aforesaid decision, the court has considered the provisions of section 37 of the Gujarat Co-operative Societies Act, 1961. The court is further considered the provisions made in Rule 3 of the Gujarat Co-operative Societies Rules, 1965.

10. Having regard to the aforesaid provisions of the Act and Rules and the aforesaid decision of this court which, in turn, refers to the binding decision of the Division Bench of this court, it is amply clear that the suit filed by an unregistered co-operative society was not maintainable and, therefore, the said objections will continue in this appeal also. As said above, this is an objection of law based an admitted fact that the appellant original plaintiff is not and was not a duly registered Cooperative Society under the Gujarat Cooperative Societies Act, 1961 and, therefore, there is no difficulty in permitting the above issues to be raised by the respondents in this First Appeal. Therefore, the respondents are permitted to raise the aforesaid issue of law based on admitted questions of fact.

11. Under the aforesaid facts and circumstances of the case, I am of the opinion that the suit was not maintainable and, therefore, the appeal would fail even on that technical ground also. Consequently, this appeal has to be dismissed as the suit was not maintainable by an unregistered cooperative society. It is more so when the suit was for specific performance of an agreement to sell and purchase in favour of an unregistered Cooperative Society.

12. Learned Advocate for the appellant has argued that the aforesaid issue is pending before the Apex Court. Simply because a matter is pending before the Apex Court, it cannot be said that this matter should be kept pending till the disposal of the aforesaid matter before the Supreme Court. The aforesaid aspect of the case has also been dealt with in para 13 of the said decision which may be reproduced as under:

"It hardly requires to be emphasized that the judgment of Division Bench is binding on this

> court. I have no reason to take a different view of the matter. Merely because an appeal is pending before the Supreme Court, it cannot be said that the decision rendered by the Division Bench is no longer a good law or that it ceases to be a binding precedent. Having regard to the facts and circumstances of the case, I am of the view that it is not necessary for me to stay hearing of the present Revision Application or to grant permission to the petitioners to file an appeal against the impugned consent decree and then to stay the proceedings of the appeal till the disposal of the appeal by the Supreme Court against the judgment rendered by the Division Bench which is reported in 20 GLR 801."

Therefore, even the second argument has also been dealt with and disposed of earlier by this court in the aforesaid decision. There is no reason to differ from the view taken by this court in the aforesaid matter on the aforesaid point. In that view of the matter, I am of the view that it is not possible to agree with the argument of the learned Advocate for the appellant to stay the proceedings of the matter since a similar issue is pending before the Supreme Court.

13. The net result of the above discussion is that the suit was not maintainable since it was instituted by an unregistered cooperative society. Therefore, when the suit has been dismissed by the trial court, the appeal would also fail on the aforesaid technical ground. Consequently, the appeal is also required to be dismissed without entering into the factual merits thereof..

14. In the aforesaid facts and circumstances of the case, the present appeal is ordered to be dismissed and the judgment and decree of the trial court are confirmed not on the grounds stated in the judgment, but on the grounds referred to hereinabove. However, considering the facts and circumstances, when the appeal is dismissed on the aforesaid ground, it is directed that the parties shall bear their own costs in this appeal.

15. At this stage, learned Advocate for the appellant states that there was interim relief granted by this court in CA No.4900/82 in FA No.1990/82, in terms of para 4(iv). She prays that the aforesaid position may be

maintained for four weeks so that the appellant can take appropriate steps for filing appropriate proceedings before the Supreme Court. When the interim relief is in force till today, the same will continue for four weeks from today. Direct Service is permitted.

6.2.2001 [D P Buch, J.]
msp